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TENAGA NASIONAL BHD

v.

MANFIELD DEVELOPMENT SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ZAINUN ALI JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-03-91-2007]

C

17 DECEMBER 2010

ARBITRATION: *Arbitrator - Appointment - Whether terms of reference for the AACC appointment had appointed Government of Malaysia to act as arbitrator - Perusal of - Effect of - Whether government should*

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have intervened - Whether its actions were legal - Effect of

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Whether plaintiffs' action frivolous, vexatious and an abuse of court's process - Rules of the High Court 1980, O. 18 r. 19*

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CONTRACT: *Shares, sale of - Whether a concluded contract - Whether there was a concluded contract between plaintiff and defendant - Evidence adduced - Effect of*

CONTRACT: *Agreement - Nature of - Contract between plaintiff,*

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defendant and AACC - Contents of - Whether defendant bound by recommendations of AACC - Effect of

CONTRACT: *Specific performance - Sale and purchase of shares - Company under which shares sold under receivership - Effect of - Whether*

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legal obligations in respect of sale and purchase of share agreement could be carried out by parties - Whether specific performance a suitable remedy

The appellant/defendant was a public listed company and the successor to the National Electric Board whilst the plaintiffs/ respondents were private limited companies. The dispute between

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the plaintiffs and the defendant revolved around the plaintiffs' shares in Northern Utilities Resources Sdn Bhd ('NUR'). The plaintiffs were the majority shareholders of NUR ('NUR shares'). NUR became distressed and defaulted on its loan repayments to its creditors. As a result RHB Bank, one of its creditors as a

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debenture holder, appointed receivers and managers to take over

the assets and undertakings of NUR. The defendant, on the directions of the Special Adviser to the Prime Minister, offered to purchase the NUR shares from the plaintiffs based on a valuation carried out by them. The plaintiffs rejected the valuation done on the shares and the parties agreed to appoint an independent consultant ('AACC') to determine the value thereof. AACC then gave its valuation to the parties and the government. The defendant found the report unacceptable and withdrew its offer. The defendant was then directed by the government to proceed with the purchase of the NUR shares, which they ignored. The plaintiffs filed a case against the defendants essentially for specific performance and for breach of contract with regard to the alleged sale and purchase of the NUR shares. The defendant's defence was essentially that there had never been a contract for the sale of the NUR shares and as such that the plaintiffs' case had been frivolous, scandalous and an abuse of the court's process. Accordingly the defendant filed a striking out application under O. 18 r. 19 Rules of the High Court 1980. The learned Senior Assistant Registrar in the High Court dismissed the defendant's application ('SAR's decision'). On appealing to the judge in chambers, the defendant's appeal against the SAR's decision was again dismissed. Hence, this appeal.

Held (allowing the appeal with costs)
Per Zainun Ali JCA:

(1) Having heard the submissions of both parties and having read the cause papers and authorities presented in this case, this court did not agree with the High Court judge for the following reasons: (i) this court was unable to ascertain from the terms of the reference re the appointment of AACC as consultant, the appointment of the Government of Malaysia ('government') to act as arbitrator to resolve the sale of shares between the parties. The plaintiffs' claim that there was a concluded contract between them and the defendant had been based purely on inferences made in respect of the several letters written by the various government officers, none of which qualified as a decision of the government that bound the defendant. The defendant at all material times had been accountable to its members and shareholders in respect of the commercial transaction entered into by them; (ii) the

A appointment and/or recommendation of AACC was not an arbitration process and was not binding on the defendant; (iii) the terms of reference on the appointment of AACC made no mention that its findings and report had been binding on the defendant. Its role had merely been to study and recommend
B the value of the plaintiffs' NUR shares. There had also not been anything in the terms of the reference which had indicated that the defendant's non-binding indicative offer would be superseded by AACC's valuation report. (paras 40 & 42)

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(2) NUR had already been in receivership. Receivers and managers had already been appointed and the debentures over the assets of NUR had crystallized. As such, the plaintiffs had not been legally competent or able and willing to perform any part
D of the purported share sale contract. The defendant's non-binding indicative offer (which had been withdrawn) was based on the net tangible assets of NUR and the latter being in receivership would have rendered the agreement (if any) untenable. (paras 48-50)

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(3) On the facts and evidence, the plaintiffs' claim that there had been a concluded contract had been frivolous, vexatious and an abuse of process. (para 53)

Per Mohd Hishamudin Yunus JCA:

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(1) The averments in the plaintiffs' statement of claim, even if true, had not disclosed the conclusion of a contract for the sale and purchase of the NUR shares between the plaintiffs and the defendant. The hopelessness of the plaintiffs' case had been
G further exacerbated by a consideration of the affidavit and documentary evidence. Thus there had not been a concluded contract between the parties. (paras 80, 83 & 85)

(2) No arbitration process had taken place between the parties.
H Due to the vast difference in the respective valuations, the parties had agreed to appoint an independent consultant to study and recommend the value of the plaintiffs' NUR shares. The defendant had every right to reject the valuation as recommended by the independent consultant, AACC, if its
I Board of Directors had taken the view that that had been the

right thing to do in the interests of the defendant after taking into consideration and evaluating AACC's report and recommendations. An examination into exh. TM17 which had been the terms on the appointment of AACC had revealed that the defendant was not bound to accept AACC's recommendations as to the value of the shares. AACC's role had merely been to recommend the sale price, which recommendation had to be accepted by the parties before submission to the government for approval. (paras 96, 100 & 101)

(3) In respect of commercial dealings or transactions between the defendant and the plaintiffs, the government could not legally make a decision on behalf of the defendant and where, as in this case, the defendant's Board of Directors had made a decision to reject AACC's recommendations on the value of the NUR shares and decided to withdraw from the transaction, the government had to respect that decision. The government's actions of overriding and directing in the manner which it did in this case, had been legally wrong and contrary to the spirit of good governance. Thus in the present case, the defendant was not legally bound and was legally right in not complying with the directive of the Prime Minister. (paras 110-112)

Bahasa Malaysia *Translation Of Headnotes*

Pihak perayu/defendan merupakan sebuah syarikat awam yang tersenarai dan pengganti kepada Lembaga Elektrik Negara sementara plaintif/responden merupakan syarikat-syarikat sendirian berhad. Pertikaian antara pihak plaintif dan defendan berpunca daripada saham plaintif di dalam Northern Utilities Resources Sdn Bhd ('NUR'). Plaintif merupakan pemegang saham majoriti di NUR ('saham NUR'). NUR telah mengalami masalah kewangan dan telah memungkiri perjanjian pinjaman dengan pemiutang-pemiutangnya. Salah seorang pemiutangnya, RHB, sebagai pemegang debentur telah melantik penerima dan Pengurus untuk mengambil alih asset dan urusan NUR. Pihak defendan, atas arahan Penasihat Khas kepada Perdana Menteri, telah menawar untuk membeli saham NUR berdasarkan suatu valuasi yang dijalankan oleh mereka ke atas saham-saham tersebut. Pihak plaintif

telah menolak penilaian yang dibuat oleh defendan ke atas saham NUR tersebut dan pihak-pihak telah bersetuju untuk melantik perunding bebas ('AACC') untuk mengenalpasti harga saham NUR tersebut. AACC telah memberikan keputusan berkenaan penilaian saham NUR tersebut kepada plaintif, defendan dan kerajaan. Pihak defendan tidak dapat menerima keputusan penilaian AACC tersebut dan telah menarik balik tawarannya. Defendan kemudiannya telah diarahkan oleh kerajaan untuk meneruskan dengan pembelian saham NUR tersebut, yang mana tidak diikuti oleh mereka. Pihak plaintif telah memfailkan suatu tindakan terhadap defendan untuk pelaksanaan spesifik dan untuk kemungkiran kontrak berkenaan pembelian dan penjualan saham NUR tersebut. Pembelaan defendan secara asas adalah bahawa pada setiap masa material tiada kontrak yang disempurnakan bagi pembelian dan penjualan saham NUR tersebut dan bahawa tindakan plaintif merupakan suatu tindakan yang remeh, menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah. Defendan telah memfailkan suatu permohonan untuk membatalkan tuntutan plaintif di bawah O. 18 r. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Penolong Kanan Pendaftar di Mahkamah Tinggi telah menolak permohonan defendan tersebut ('keputusan PKP'). Defendan telah memohon kepada Hakim dalam Kamar terhadap keputusan SAR tersebut tetapi permohonannya telah ditolak. Maka defendan telah memfailkan rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zainun Ali HMR:

(1) Setelah mendengar hujahan kedua-dua pihak dan setelah membaca pliding dan otoriti di dalam kes ini, mahkamah ini tidak bersetuju dengan hakim Mahkamah Tinggi untuk sebab-sebab berikut: (i) setelah meneliti terma-terma dan syarat perlantikan AACC sebagai perunding bebas, tiada sebarang terma yang menunjukkan bahawa Kerajaan Malaysia ('kerajaan') telah dilantik sebagai penimbangtara antara pihak plaintif dan defendan untuk menyelesaikan jualbeli saham NUR tersebut. Dakwaan plaintif tentang kewujudan suatu kontrak yang telah disempurnakan antaranya dengan defendan adalah berdasarkan inferens atau kesimpulan yang dibuat setelah merujuk kepada beberapa pucuk surat yang ditulis oleh pegawai-pegawai kerajaan yang berlainan, yang mana tiada satu

pun dapat dikatakan merupakan keputusan kerajaan yang mengikat defendan. Pada setiap masa yang material, defendan telah bertanggungjawab kepada ahli-ahli dan pemegang sahamnya berkaitan transaksi-transaksi komersial yang diceburi olehnya; (ii) perlantikan dan/atau syor AACC tidak merupakan suatu proses timbangtara dan oleh itu ianya tidak mengikat defendan; (iii) terma dan syarat perlantikan AACC tidak di mana-mana menyatakan bahawa keputusan dan laporan AACC akan mengikat defendan. Fungsi mereka hanyalah untuk mengkaji dan mensyorkan nilai untuk saham NUR tersebut. Tiada juga sebarang syarat di dalam terma dan perlantikan AACC tersebut yang menyatakan bahawa laporan penilaian AACC akan mengambil tempat tawaran defendan yang asal.

(2) NUR telahpun berada di dalam penerimaan. Penerima dan pengurus telahpun dilantik dan debentur ke atas aset NUR telahpun berubah bentuk. Maka plaintif tidak berkebolehan secara sah mahupun berkemampuan untuk menjalankan sebarang terma berkenaan dengan perjanjian jualbeli saham NUR tersebut. Tawaran defendan yang tidak mengikat (yang mana telah ditarik balik) telah diberikan berdasarkan aset ketara bersih NUR dan perjanjian tersebut (sekiranya ada) akan dijadikan tidak boleh diterima memandangkan fakta bahawa NUR berada di dalam penerimaan.

(3) Berdasarkan fakta dan keterangan, tuntutan plaintif bahawa terdapat kontrak yang disempurnakan antara pihak-pihak, adalah remeh, menyusahkan dan suatu penyalahgunaan proses mahkamah.

Oleh Hishamudin Mohd Yunus HMR:

(1) Pernyataan-pernyataan plaintif di dalam pernyataan tuntutannya, walaupun benar, tidak menunjukkan kewujudan suatu kontrak yang telah disempurnakan antara pihak-pihak untuk pembelian saham NUR. Ketiadaan harapan kes plaintif telah dijadikan lebih buruk lagi apabila keterangan afidavit dan dokumen diteliti. Maka tiada kontrak yang disempurnakan antara pihak-pihak.

A **(2)** Proses timbangtara tidak dijalankan antara pihak plaintif dan defendan. Berdasarkan jurang yang luas antara kedua penilaian saham NUR tersebut, parti-parti telah bersetuju untuk melantik perunding bebas untuk mengkaji dan mensyorkan nilai saham NUR tersebut. Pihak defendan mempunyai hak untuk menolak
B valuasi saham NUR yang dikemukakan oleh AACC, terutama sekali di dalam keadaan dimana Lembaga Pengarah defendan mengambil keputusan bahawa penolakan laporan AACC tersebut adalah perlu untuk melindungi kepentingannya. Penelitian exh. TM17 yang merupakan terma dan syarat
C perlantikan AACC telah menunjukkan bahawa defendan tidak terikat untuk menerima syor AACC berkenaan nilai saham NUR tersebut. Fungsi AACC hanyalah untuk mengesyorkan harga jualannya, yang mana harus diterima oleh plaintif dan defendan sebelum dikemukakan kepada kerajaan untuk
D kelulusan.

(3) Berkaitan dengan transaksi-transaksi perniagaan antara plaintif dan defendan, kerajaan tidak boleh dari segi undang-undang membuat keputusan bagi pihak defendan dan dalam kes ini
E dimana Lembaga Pengarah defendan telah membuat keputusan untuk menolak syor AACC berkenaan saham NUR tersebut dan mengambil keputusan untuk menarik balik tawarannya, kerajaan seharusnya menghormati keputusan tersebut. Tindakan kerajaan menolak keputusan defendan dan memberi
F arahan sepertimana yang telah dilakukan di dalam kes ini, adalah salah di sisi undang-undang dan bertentangan dengan pentadbiran yang baik. Maka di dalam kes ini, defendan tidak terikat secara undang-undang dan betul di sisi undang-undang dalam tindakannya tidak mengikuti arahan Perdana Menteri.

G **Case(s) referred to:**

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & 5 Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

H **Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

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For the appellant - Alvin John (Nurfadlina Yahya with him); M/s Alvin John & Partners
For the respondents - LH Chua; M/s LH Chua

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D7-22-892-2005]

Reported by Sharmini Pillai

JUDGMENT

Zainun Ali JCA:

[1] The appeal before us is an appeal against the decision of the learned High Court judge made on 16 May 2007 which dismissed with costs the appellant/defendant's notice of appeal to the judge in chambers (dated 9 October 2006) an application to strike out the writ of summons and statement of claim dated 23 June 2005 pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of High Court 1980 and/or under the inherent jurisdiction of the court.

The Facts

[2] The appellant (hereinafter referred to as the defendant) is a public listed company incorporated in Malaysia, having its registered address at No. 129 Jalan Bangsar, Peti Surat 11003, 50732, Kuala Lumpur.

[3] The first respondent (referred to as the first plaintiff) is a private limited company incorporated in Malaysia having its registered address at No. 19 2nd Floor, Jalan 1/57A Batu 3, Jalan Ipoh 51200 Kuala Lumpur.

[4] The second respondent (now referred to as the second plaintiff) is a private limited company incorporated in Malaysia having its registered office at B-5-6 5th Floor Block B Megan Phileo Avenue II Jalan Yap Kwan Seng 50450 Kuala Lumpur.

[5] Both the plaintiffs are the shareholders of a company called Northern Utility Resources Sdn Bhd (referred to as NUR) which is a private limited company incorporated in Malaysia having its business address at Lot 3 No. 12 & 361 -365 Kulim Hi-Tech Park Mukim Padang Cina 09000 Kulim Kedah. NUR is under

A receivership. Receivers and Managers have been appointed on 24 November 2004 to take over the properties and assets and undertakings of NUR.

[6] The plaintiffs are the majority shareholders of NUR with
B 60% equity/shares whilst the remaining 40% equity/shares in NUR is held in equal proportion of 20 each by the defendant and Khazanah Nasional Bhd.

The Plaintiff's Case

C **[7]** It is the plaintiffs' case that in the past there was a Power Purchase Agreement (PPA) which began in July 2000, pursuant to a letter from the PM's Special Advisor to the defendant.

[8] According to the plaintiffs on 17 February 2002, the Special
D Advisor conveyed the Government of Malaysia's decision for the defendant to immediately re-negotiate and finalize the PPA on terms and conditions as set out in the said letter.

[9] Thus at a meeting between the plaintiffs and the defendant's
E former Chairman on 13 January 2003, the latter offered to purchase all of the 60% stake held by the plaintiffs in NUR at a fair price.

[10] This was followed by a letter dated 20 February 2003 from the Special Advisor, conveying the Government's decision that the
F defendant is to purchase the plaintiff's 60% equity in NUR at a fair price and for parties to commence negotiation immediately.

[11] A shareholder's meeting of NUR was held on 6 March 2003, to discuss the issue as spelt out in the Special Advisor's
G letter of 20 February 2003. According to the plaintiffs the defendant's representative at that meeting informed them that the defendant is preparing a positive response to the Special Advisor's request and that the defendant will commence negotiation with the plaintiff for the purchase of all of plaintiffs' 60% equity in NUR.

H **[12]** According to the plaintiffs, the defendant on 15 March 2003 confirmed their offer to purchase all of plaintiff's 60% equity in NUR and that the defendant will commence negotiation with the parties concerned.

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[13] In the plaintiff's statement of claim at para. 12, it was stated that on 23 June 2003 the defendant made an offer to purchase all of plaintiff's 60% equity in NUR for a sum of RM25,420,000, based on the defendant's valuation after the exercise of a due diligence on NUR.

[14] The plaintiffs rejected the defendant's offer with regard to the valuation.

[15] The plaintiffs had their own valuation of their 60% equity in NUR. They said that the valuation was undertaken by an international firm specializing in the Power Sector ie, Babcock and Brown Asia Pacific (BB) which estimated the value of the 60% equity to be RM558m. The plaintiff claimed that this valuation was confirmed as being reasonable by an international accounting firm, Deloitte and Touche Corporate Advisory Services Sdn Bhd.

[16] The huge disparity in the plaintiff's and defendant's valuation of the plaintiffs 60% equity in NUR led to the formation of a Special Committee. Several Meetings were held by the Special Committee where both parties and other relevant agencies attended, chaired by the Special Advisor. These other relevant agencies included bodies such as the Economic Planning Unit of Prime Minister's Department, the Jabatan Kerja Raya etc, were invited to the Special Meeting from time to time.

[17] These resulted in the defendant agreeing to the government's directive that the parties submit their matter to arbitration for purposes of determining the fair value of all of plaintiffs' 60% equity in NUR.

[18] On 2 October 2003, the agreement for Consultancy Services was entered into between them and executed by the defendant, the plaintiffs and the Independent Consultant, one Anuarul Azizan Chew Consulting Sdn Bhd. (AACC) for the purpose of studying and recommending a fair value for all of plaintiff's 60% equity in NUR.

[19] On 21 November 2003, AACC prepared and submitted their final report to the Government, stating that the fair value for all of plaintiff's 60% equity in NUR is RM332,336,000 subject to its acceptance by the Government.

[20] However the defendant did not agree with AACC's valuation report. Then the defendant, by way of letter dated 28 June 2004 signed by the then outgoing Chief Executive Officer, which was faxed to the plaintiff and to the Special Advisor, a letter which stated their intention to withdraw from the Arbitration.

[21] The said letter of intention was rejected by the Special Advisor by letter of 6 July 2004.

[22] The Special Advisor in a subsequent letter to the Executive Chairman of NUR dated 7 September 2004, stated that he had written to NUR's auditors to confirm that the Government's involvement in the sale of all of plaintiff's 60% equity in NUR to the defendant continues and that he had informed the Prime Minister that the Arbitration process is still binding on all parties concerned. This was followed by a letter written by the Prime Minister on 13 September 2004 to the Managing Director of Khazanah to take appropriate action to abide by the final determination and decision of Arbitration Proceedings.

[23] The Special Advisor by letter of 20 September 2004 informed the defendants and the plaintiffs and all parties concerned of the Government's acceptance of fair value for all of 60% equity in NUR as RM332,336,000, and AACC will prepare the Sales and Purchase Agreement between the plaintiffs and defendants as purchaser for the sale and purchase of all the plaintiff's 60% equity in NUR at the purchase price of RM332,336,000.

[24] On 28 October 2004, the AACC sent to the defendant an engrossed copy of the SPA. However this was ignored by the defendant. According to the plaintiffs, the defendant had failed, neglected and omitted to enter into and execute the SPA with the plaintiffs contrary to their obligation and the Government's directive.

[25] The entire matter can be summarised thus: that it is the plaintiff's claim that there is a concluded contract which is valid, binding and enforceable as between the plaintiffs as vendors and the defendant as purchaser for the purchase, acquisition and acceptance of transfer by the defendant of all of plaintiff's, 60% equity in NUR free of all encumbrances, at the purchase consideration of RM332,336,000.

[26] Since the plaintiffs, had all along been ready, willing and able to perform and discharge their part of the contract to sell and transfer all of plaintiff's 60% equity in NUR to the defendant, the defendant's refusal to abide by the terms of the contract meant that the defendant had committed a fundamental breach of contract, resulting in the plaintiffs suffering substantial pecuniary damage and loss.

[27] The plaintiffs then filed its suit against the defendant for specific performance of the contract between the 1st and 2nd plaintiffs and the defendant to purchase, acquire and accept the sale by and through from the plaintiffs of all the plaintiff's 60% in NUR free of all encumbrances in the sum of RM332,336,000 and damages *in lieu* of Specific Performance and for the necessary orders and directions.

[28] The defendant's defence is that the content of the letter dated 17 December 2002 from the Chief Executive Officer of the Economic Planning Unit (EPU) of the PM's Department to the defendant only showed that the above "arrangement" was merely a proposal which *inter alia* expressly stated that:

(i) Pursuant to the EPU's letter requesting the defendant to buy excess electricity from NUR, the Energy Commission had informed NUR that its (NUR's) license has been amended to enable it to sell excess electricity to the defendant on a "take as supplied" basis.

(ii) That the plaintiff by letter of 7 July 2003 in response to defendant's letter of offer requested the defendant to review its initial offer, based on the plaintiff's own valuation of the 60% shares in NUR ie, RM538 million.

(iii) That the defendant's response to the said plaintiff's letter of 7 July 2003 was to point out to the plaintiff that its (the plaintiff's) valuation on NUR, through Messrs Babcock and Brown Asia Pacific, had not taken into account the current status of NUR and the debt outstanding to the creditors, and that due to debt overhang, no value can be apportioned to the equity holders given that the lenders have a higher claim on the business and in addition to the aforesaid the defendant also insisted on a full due diligence on NUR and access to all information and management reports are required to come up with a revised offer.

A **[29]** More importantly the defendant took the position that the Babcock valuation was not made independently nor made with the acquiescence and/or consent of the defendant. The defendant said that it was in fact done unilaterally by the plaintiffs, completely on their own accord.

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[30] It was also the defendant's position that it was due to the vast difference in the respective valuations that both parties had mutually agreed with the Officer in the Prime Minister's Office that an independent consultant be appointed to study and recommend
C to the defendant the value of the plaintiff's 60% equity in NUR upon the conclusion of the exercise of due diligence on it.

[31] The defendant further submitted that the appointment of the consultant Anuarul Azizan Chew (ACC) as the independent consultant and the terms of reference set out for the AACC was
D basically to study and recommend the value of plaintiff's 60% equity in NUR to the defendant.

[32] The defendant also averred that save for an Agreement for Consultancy Services dated 2 October 2003, the letters of 28
E June 2004 and 6 July 2004 from the defendant to the Special Advisor and *vice versa*, paras. 17, 18, 19, 20, 21 and 22 of statement of claim is denied.

[33] It was the defendant's case that at all material times the
F appointment of the AACC is to provide an independent and fair valuation of the plaintiff's 60% equity in NUR subject to the agreement of all parties (our emphasis).

[34] It was also crucial to consider the defendant's position that
G the scope of work for AACC is to determine and/or give a fair and reasonable value for the assets of NUR and in doing so, take into account the spirit of the letter issued by the government and proceed to implement the directive with the assistance of the government.

H **[35]** AACC is also to take into account not only the reason for establishing NUR but also the current state of affairs which led the government to instruct the plaintiff as vendors to sell their interest to the defendant.

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[36] AACC is to also consider both parties' valuation submission and make a determination of a fair value based on its findings and upon a conclusion of a due diligence exercise. The AACC is to recommend a sale price subject to the acceptance by both parties of the fair value price.

[37] The main bone of the defendant's contention (if it could be viewed as such), is that the AACC in assessing the facts and drawing up its report had made several assumptions. Firstly the AACC assumed that the Defendant will enter into a Power Purchase Agreement (PPA) on which the AACC had based the valuation of NUR. The defendant contended that this would be incorrect. Secondly the AACC's assumption that a PPA is to be entered into by the defendant is misleading and wrong since the purpose of entering a PPA has since ceased since it had been super ceded by a share sale between the parties. AACC's wrong assumption also include the fact that NUR is a going concern (merely on the assumption that all they have to do is to enter into a PPA), when it is not, having gone under receivership.

[38] The defendant took a vigorous stand with regard to the end result ie, the AACC's finalised draft report which made no changes whatsoever to accommodate or take into account the concerns raised by the defendant in its letter of 19 November 2003. The AACC merely countered it by saying in a letter of 23 November 2003 that it had taken the defendant's concerns into consideration and that the fair value as set out in the purported 1st final report should remain unchanged. No reasons or explanations were given by the AACC.

[39] In the light of the above, the issues are:

(a) Whether the plaintiff's claim ought to be struck out under O. 18 r. 19(1) RHC 1980 for being:

(i) scandalous, frivolous and vexatious and

(ii) it is an abuse of the process of court

(b) whether the plaintiff's claim ought to be struck out under the inherent jurisdiction of the court on the following basis:

A (i) that there is no concluded contract between the plaintiff and the defendant in respect of the acquisition of the plaintiff's shares in NUR;

(ii) The non-binding indicative offer dated 23 June 2003 has
B been withdrawn and the plaintiff was not able to fulfil the conditions stated therein;

(iii) the draft SPA for the sale of shares which was unilaterally prepared by the plaintiff was never agreed nor accepted by
C the defendant at any material time;

(iv) that NUR is in receivership since 24 November 2004 and thereby insolvent which in any event would render a claim for specific performance and/or damages frivolous and an abuse of the process of court;

D

(v) As NUR is in receivership the shares owned by the plaintiff are worthless;

(vi) the plaintiff's alternative claim for damages is an attempt for unjust enrichment and an abuse of process;
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[40] After having heard submission of both parties and reading the cause paper and authorities, we do not agree with the learned judge of the High Court for the following reasons:

F (a) We are unable to ascertain from the terms of reference of the appointment and scope of work of the Consultant (AACC) which indicate the appointment of the Government of Malaysia to act as an arbitrator to resolve the sale of shares between the plaintiff and defendant. The plaintiff's claim that
G there is an alleged concluded contract between the plaintiff and defendant was based purely upon the inferences made in respect of letters written by various government officers such as special Advisor, the Chief Executive Officer of the defendant etc as found in the exhibits.

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It is critical to conclude that none of the abovementioned government letters qualify as a decision of the Government of Malaysia which binds the defendant as they were not, as it were, duly approved by the Cabinet or Parliament bearing in mind that the defendant is an independent Public Owned
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Company. The defendant is at all material times accountable to its members and shareholders in respect of commercial transaction entered into by the defendant.

(b) With regard to the appointment and/or recommendation of independent consultant we find that it is not an arbitration process nor is it binding on the defendant.

[41] Insofar as the government was concerned, it played the role (if at all) of assisting the plaintiff and defendant get out of their impasse in arriving at a mutually agreed fair price for the 60% of plaintiff's equity shares in NUR Sdn. Bhd. What is critical is that any form of assistance by the government is conditional upon or subject to the defendant's acceptance of the fair price of plaintiff's shares and the defendant's agreeing to the terms and conditions of the Sale and Purchase Agreement in respect a sale of shares.

[42] Thirdly, the terms of reference on the appointment of Independent Consultant (AACC) made no mention that the finding of Report of Independent Consultant is binding on the defendant. Theirs was to merely study and recommend their findings of the value of the plaintiff's shares to the defendant but this is again subject to the defendant's acceptance of the AACC's recommendations.

[43] It would be useful to lay down the exact words as found in the paragraph and clause of the terms of reference:

Your Requirement

1. The Joint Parties seek to appoint the Independent Consultant to study and recommend the value to Manfield Development (4%) and Jalinan Muhibah Sdn Bhd's (20%) interest in NUR to Tenaga Nasional Berhad.

Scope of Work

2. The Independent Consultant understands that our overall scope is to work with the GOM to determine and/or give a fair and reasonable value for NUR based from submissions from both TNB as "Purchaser" and both Manfield and Jalinan as "Vendor" ...

   (a) To become familiar with the spirit and intent of GOM letter ...

A (b) To become familiar with NUR ...

(c) Independent Consultant will receive:

i. from the Purchaser, a written offer for the Vendor's interest ...

B

ii. from the Vendor, a written valuation of its 60% interest which is expected to include the basis for the Valuation.

(d) The Independent Consultant will review both the
C Purchaser's and Vendor's valuation submissions and make a determination on their fair value ...

(e) The Independent Consultant will submit a fair value price, expressing their opinion ...

D (f) The Independent Consultant will present the sale price to both the Purchaser and Vendor together with a recommendation to accept the sale price subject to the acceptance of the fair value price by the COM.

N.B (Please note that under this paragraph the acceptance
E by GOM of the fair price recommended by the Independent Consultant does not mean that it is binding on the Defendant because the clause here merely provides that prior to the Independent Consultant recommending its sudy on the fair price of the Plaintiff's
F shares in NUR to both the Plaintiff and the Defendant it must be first Ok'd or approved by GOM)

(g) The Independent Consultant will assist both parties in expediting the transaction ...

G (h) The Independent Consultant shall if so required by the Joint Parties ... assist and clarify the final report ...

[44] The scope of the AACC's work will include all procedures necessary generally accepted auditing standards.

H **[45]** Moreover there was nothing in the terms of reference which indicated that the defendant's non-binding indicative offer shall be superceded by the AACC's Valuation Report. In any case exhs. TM18 and TM21 clearly manifest the defendant's objections, non acceptance and disagreements with the AACC's report on the
I valuation of the plaintiff's 60% equity in NUR at RM332,336,000.

[46] Thus on 28 June 2004, the defendant withdrew its non-binding offer in writing and indicated to the plaintiff, that: A

(i) They received the AACC's final report only on 5 April 2004;

(ii) The defendant's board has rejected the Valuation Reports and that the defendant has never agreed to the Final Reports prepared by AACC. B

[47] It was also noted that the plaintiff had failed to fulfil and comply with the condition precedent of the defendant's non binding indicative offer. C

[48] One other critical factor is that NUR is already in receivership. Receivers and Managers have been appointed and the debentures over the assets of NUR have crystallised.

[49] In that case the plaintiff is not legally competent to be able and willing to perform any part of purported share sale contract. D

[50] As a matter of interest, it might be mentioned here that the defendant's non binding indicative offer (which had been withdrawn) was based on the NTA (net tangible asset) of NUR. NUR's receivership would render the agreement (if any) untenable. E

[51] Looking closely at the terms of reference and reading it together with the defendant's non binding indicative offer at exh. TM13 (which clearly spells out that the terms and conditions of the SPA) the sale of shares must be approved and agreed upon by defendant before the SPA is finalised, it is clear that the terms of the SPA were never finalised and agreed let alone accepted by the defendant. It is therefore plain and obvious that there was no concluded share sale agreement at any material time. F G

[52] At the risk of being repetitive, it is reiterated that the facts and documents filed in this appeal clearly showed that the defendant had withdrawn their non binding indicative offer to purchase the plaintiff's 60% shares in NUR; that the defendant could not agree on the AACC's recommendation on the value of the plaintiff's shares in NUR; that it's clear that the SPA was unilaterally prepared by the plaintiff and the AACC without the H I

defendant's acceptance or concurrence despite the various objections and disagreement of defendant with regard to the AACC's valuation on the plaintiff's 60% equity in NUR.

[53] Clearly the plaintiff's claim that there is a concluded contract is frivolous and vexatious and an abuse of process. Over and above these, the plaintiffs is aware that the defendant has financial strength and is bound by the Rules and requirements of supervisory and enforcement agencies such as the Kuala Lumpur Stock Exchange (Bursa Malaysia) and so it is untenable for the plaintiff to indicate that the government's advice is binding on the defendant.

[54] The law relating to the striking out of a suit is settled. Order 18 r. 19(1) of the Rules of the High Court 1980 reads as follows:

> (1) The Court may at any stage of proceedings order to be struck out or amended any pleading or the endorsement of any writ in action or anything in any pleading or in the endorsement, on the ground that:
>
> (a) It disclose no reasonable cause of action or defence as the case may be; or
>
> (b) It is scandalous, frivolous or vexatious, or
>
> (c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) It is otherwise an abuse of process of the court;

[55] And may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be.

The question is whether the plaintiffs' case or claim is plainly and obviously unsustainable. Is it plain and obvious?

We find the answer provided by the court in *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd* [1996] 1 MLJ 661 at pp. 662 and 663 to be more than adequate. The Court of Appeal in reversing the decision of the High Court stated that:

> (1) A "cause of action" is the entire set of facts that gives to an enforceable claim; the phrase comprises every fact which if traversed, the (Respondent) Plaintiff must prove in order to obtain judgment;

(2) What may be "plain and obvious" to a specialist in company law may not be so to another who does not have this specialised knowledge. The standard is an objective one and implies that the perception required is that of a person who has the required expertise. The court may strike out a claim even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action.

[56] In the circumstance of this appeal we unanimously found that this is a plain and obvious case to allow an application to strike out under O. 18 r. 19 RHC 1980.

[57] We therefore allowed the appeal with costs. The Order of High Court was set aside. The deposit is to be refunded to the defendant.

Hishamudin Mohd Yunus JCA:

[58] This is an appeal against an interlocutory decision of the learned judge of the High Court (Commercial Division) of Kuala Lumpur who, on 16 May 2007, had dismissed the appellant's (the defendant/applicant at the interlocutory proceeding before the High Court) appeal to the judge in chambers against a decision of the learned Senior Assistant Registrar of 4 October 2006.

[59] Earlier, on 4 October 2006 the learned Senior Assistant Registrar of the Kuala Lumpur High Court had dismissed the appellant's/defendant's application under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 to strike out the plaintiffs' statement of claim on the grounds that the plaintiffs' claim against the defendant for breach of contract is scandalous, frivolous or vexatious or, alternatively, an abuse of the process of the court.

[60] On 7 April 2009 this court, having heard submissions, unanimously, allowed the appellant's appeal with costs. In making our decision, we, unfortunately, do not have the benefit of the grounds of judgment of the learned judge (who had dismissed the defendant's appeal to the judge in chambers).

[61] In writing this judgment, I have had the benefit of reading the draft grounds of judgment of my learned colleague, Zainun Ali JCA.

A **[62]** In this judgment, I shall be referring to the appellant as the 'defendant' and the respondents as the 'plaintiffs'.

[63] The defendant is a public listed company incorporated in Malaysia and having its registered address in Kuala Lumpur. It is
B a successor company to the National Electric Board (now defunct) under the Electricity Supply (Successor Company) Act 1990 which provides for the privatization of the National Electric Board.

[64] The first and second plaintiffs are private limited companies having their registered addresses in Kuala Lumpur.
C

[65] The dispute between the plaintiffs and the defendant involves the plaintiffs' shares in a private limited company known as Northern Utilities Resources Sdn Bhd ('NUR'). NUR is licensed by the Minister of Energy, Telecommunications and Multimedia to
D operate an Independent Power Utility (IPU) facility in Kulim Hi-Tech Park.

[66] The plaintiffs are the majority shareholders of NUR, holding 60% equity/shares in NUR. The defendant holds 20% of the
E shares of NUR; whilst Khazanah Nasional Berhad holds the remaining 20%.

[67] NUR was a distressed company and since 2002 NUR had defaulted in its loan repayments to its creditors, and as a result
F the lenders had frozen the company's access to its remaining credit facilities. On 24 November 2004, one of NUR's creditors, namely, RHB Bank Berhad, pursuant to a debenture dated 27 November 1997 executed by NUR in its (RHB's) favour, appointed receivers and managers to take over the assets and
G undertakings of NUR.

[68] But prior to NUR being placed under receivership, Tan Sri Ali Abul Hassan, the Special Adviser to the then Prime Minister (Dato' Seri (Dr.) Mahathir), on 20 February 2003, wrote a letter to the then Chairman (Dato' (Dr.) Awang Adek bin Hussin) of
H the defendant informing that the Prime Minister had made a decision that the defendant should purchase the plaintiffs' shares in NUR; and that the defendant was to ensure that the shares are purchased at a fair price. The defendant was also directed to commence negotiations with the plaintiffs as soon as possible.
I

[69] On 6 March 2003 the representatives of the defendant had a meeting with the representatives of the plaintiffs to discuss the Prime Minister's directive.

[70] On 23 June 2003, by way of a letter to the plaintiffs, the defendant made an indicative non-binding offer to purchase all of the plaintiffs' 60% equity in NUR at a price of RM25,420,000.00, this sum being based on the defendant's valuation of the shares; but subject to certain pre-conditions being met or satisfied. The plaintiffs, *via* the first plaintiff's letter of 7 July 2003, rejected the defendant's offer with regard to the valuation. According to the plaintiffs' valuation, the value of the plaintiffs' 60% equity in NUR was very much higher, and the plaintiffs' proposed price was RM538,000,000. Due to the vast difference in the respective valuations, thereafter, on the recommendation of the Prime Minister's office, the plaintiffs and the defendant mutually agreed to the appointment of an independent consultant, Anuarul Azizan Chew Consulting Sdn Bhd (AACC), to study and recommend the fair value of the plaintiffs' 60% equity in NUR to the defendant, based on the submissions from both the plaintiffs and defendant, and upon the conclusion of a due diligence exercise of NUR. On 21 November 2003 AACC prepared and submitted a Final Valuation Report to the Government, to the defendant and to the plaintiffs, stating that the fair value of the plaintiffs' 60% equity in NUR is RM332,336,000. The defendant found that both the approach taken by the independent consultant (AACC) in conducting the study as well as the fair value recommended by the independent consultant unacceptable. By a letter dated 28 June 2004 the defendant informed the plaintiffs that it found the report, as well as the recommendation as to the pricing of the plaintiffs' 60% equity in NUR unacceptable and that it was withdrawing its non-binding indicative offer of 23 June 2003.

[71] The plaintiffs' claim against the defendant is essentially for breach of contract on the part of the latter pertaining to the alleged sale of the plaintiffs' equity/shares in NUR, the plaintiffs being the alleged vendors and the defendant the alleged purchaser; and the plaintiffs are seeking against the defendant an order for specific performance of the contract (or damages *in lieu* of specific performance).

A **[72]** The defence of the defendant is essentially that there was never in the first place any contract for the sale and purchase of NUR shares concluded between the plaintiffs and the defendant, and hence the claim of the plaintiffs is frivolous, scandalous or vexatious, or, alternatively, an abuse of the process of the court.

B

[73] The plaintiffs filed their statement of claim on 23 June 2005 (and amended on 22 July 2005). The defendant filed its statement of defence and counterclaim on 25 August 2005. The plaintiffs' reply to the statement of defence, together with the plaintiffs'
C defence to the defendant's counterclaim, were filed on 22 September 2005.

[74] The defendant's O. 18 r. 19 striking out application was filed on 22 September 2005.

D **[75]** The defendant/applicant filed two affidavits, namely, the affidavits of T. Mafuza bin T. Mansor, the Manager (Finance and Investment) of the Legal Services Department of the defendant. The first plaintiff/first respondent filed one affidavit, that of Mohd Adnan bin Hashim, a director of the first plaintiff. The second
E plaintiff/second respondent also filed just one affidavit, that is, that of Saiful Azhar bin Mohd, a director of the second plaintiff.

[76] As pointed out earlier, the learned Senior Assistant Registrar of the High Court made the order of dismissal (dismissing the
F defendant's O. 18 r. 19 striking out application) on 4 October 2006, and, on appeal to the judge in chambers, the learned High Court Judge made his order of dismissal (dismissing the defendant's appeal) on 16 May 2007.

G **[77]** The defendant/appellant appealed to this court by its notice of appeal dated 31 May 2007 and filed on 8 June 2007.

[78] As said earlier, we unanimously allowed the appeal with costs.

H **[79]** I have examined the plaintiffs' amended statement of claim. The relevant paragraphs read as follows:

I

5. The 1st plaintiff and 2nd plaintiff ("Plaintiffs") hold a combined 60% equity in NUR in the following proportion:

Shareholder	Description of Shares	Percentage
1st Plaintiff	106,600,000 NUR RC Preference Shares) & 33,400,000 NUR Ordinary Shares)	40%
2nd Plaintiff	53,300,000 NUR RC Preference Shares) & 16,700,000 NUR Ordinary Shares)	20%
	Total:	60%

6. The remaining 40% equity in NUR is held in equal proportion by the defendant, ie, 20% and one Khazanah Nasional Berhad (Co. No. 275505-K) ("Khazanah") – 20%.

7. On 17.12.2002, pursuant to the Federal Government of Malaysia's (GOM) initial directive and after 2 ½ years of negotiations on a Power Purchase Agreement (PPA) which commenced in July 2000, by way of a letter from the Special Adviser to YAB Prime Minister of Malaysia ("Special Adviser") to the defendant, the Special Adviser conveyed the GOM's Decision to the defendant to immediately re-negotiate and finalize the PPA on terms and conditions as set out in the same letter.

8. On or about 13.1.2003, at a meeting held between the plaintiffs and the defendant's former Chairman, one Y.Bhg Datuk Dr. Awang Adek bin Hussin, the defendant's former Chairman offered to purchase all of the 60% equity held by the plaintiffs in NUR ("Plaintiffs' 60% equity in NUR") at a fair price.

9. On 20.2.2003 by way of the Special Adviser's letter to the defendant, the Special Adviser conveyed the GOM's Decision that the defendant is to purchase all of the plaintiffs' 60% equity in NUR at a fair price and to immediately commence negotiations with all parties concerned.

10. On 6.3.2003 at the NUR Shareholders' Meeting held specifically to discuss the Special Adviser's letter of 20.2.2003 to the defendant, the defendant's representatives duly informed the Shareholders' Meeting that the defendant

A is preparing a positive response to the Special Adviser and that the defendant will commence negotiations with the plaintiffs for the purchase of all of the plaintiffs' 60% equity in NUR.

B 11. On 15.3.2003 in response to the Special Adviser's letter dated 20.2.2003 and by way of a reply to the Special Adviser the defendant confirmed their offer to purchase all of the plaintiffs' 60% equity in NUR and that the defendant will commence negotiations with all parties concerned.

C 12. On 23.6.2003 by way of the defendant's letter to the plaintiffs the defendant made an offer to purchase all of the plaintiffs' 60% equity in NUR at a sum of RM25,420,000.00 based on the defendant's valuation after the performance of a due diligence exercise on NUR. The plaintiffs rejected the defendant's offer with regard to the valuation.

D 13. The plaintiffs' valuation of all of the plaintiffs' 60% equity in NUR which was undertaken by an international firm specializing in the Power Sector namely Messrs. Babcock & Brown Asia Pacific ("BB") is a sum of RM558,000,000.00. BB's valuation was reviewed and found to be reasonable by an international accounting firm, Deloitte & Touche Corporate Advisory Services Sdn Bhd.

E 14. Due to the vast difference in the respective valuations, the then YAB Prime Minister of Malaysia decided that there shall be an independent valuation of all of the plaintiffs' 60% equity in NUR and that the GOM shall be the Arbitrator to resolve the impasse.

F 15. Pursuant thereto the defendant and their representatives have attended Meetings held on 24.7.2003, 16.9.2003, 22.9.2003, 2.10.2003 and 17.11.2003 with the plaintiffs. The Meetings were chaired by the Special Adviser as Arbitrator whose Special Committee comprised of representatives from the Ministry of Finance, the Ministry of Energy, Telecommunication and Multimedia, the Economic Planning Unit of The Prime Minister's Department, the Implementation and Co-ordination Unit of The Prime Minister's Department, Jabatan Kerja Raya and on a few occasions representatives from Bank Negara and Khazanah.

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H

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16. The defendant agreed to the GOM's Directive that parties involved are to submit to Arbitration for the purpose of determining the fair value of all of the plaintiffs 60% equity in NUR. The Special Committee undertook to shortlist the Independent Consultants and set out the Terms of Reference for the Consultants.

17. On 2.10.2003 an Agreement for Consultancy Services was entered into between and executed by the defendant, the plaintiffs and the Independent Consultant, Anuarul Azizan Chew Consulting Sdn Bhd. (Co. No. 373601-V) of No. 18, Jalan 1/64, Off Jalan Kolam Air/Jalan Ipoh, 51200 Kuala Lumpur ("AACC") for the purpose of studying and recommending a fair value for all of the plaintiffs' 60% equity in NUR.

18. On 30.10.2003 and 1.12.2003, the plaintiffs paid AACC's 1st Interim Bill of RM70,875.00 and 2nd Interim bill of RM99,000.00 respectively towards a portion of their share of part of the total cost. The defendant has also paid to AACC the same amount being a portion of their share of part of the total cost of the valuation exercise.

19. On 17.11.2003, after representations by the defendant and by the plaintiffs and a Financial Due Diligence exercise, AACC presented the Draft Report to the Special Committee and the Chairman of the Special Committee permitted the plaintiffs and the defendant to make their respective comments on the Draft Report in writing to AACC.

20. On 21.11.2003 AACC prepared and submitted a Final Valuation Report to the GOM, to the defendant and to the plaintiffs, stating unequivocally that the fair value for all of the plaintiffs' 60% equity in NUR is RM332,336,000.00, subject to acceptance by the GOM.

21. By way of letter dated 28.6.2004 signed by the defendant's Chief Executive Officer (whose term of office ended on 30.6.2004) and faxed to the plaintiffs on 2.7.2004 and a copy sent to the Special Adviser, the defendant stated their intention to withdraw from the Arbitration.

22. On or about 6.7.2004, the Special Adviser wrote to the defendant rejecting the defendant's intention to withdraw from the Arbitration.

23. By way of letter dated 7.9.2004 from the Special Adviser to the Executive Chairman of NUR, the Special Adviser categorically stated, amongst other things, that he has written to NUR's Auditors to confirm that the GOM's involvement in the sale of all of the plaintiffs' 60% equity in NUR to the defendant is still ongoing and he has informed YAB Prime Minister of Malaysia that the Arbitration process is still binding on all parties concerned and he has communicated with Khazanah to ensure that the shares held are not transferred and that Khazanah should pay up the calls in arrears to assist in the cash flow problem in NUR.

24. On or about 13.9.2004, YAB Prime Minister of Malaysia wrote to the Managing Director of Khazanah directing him to take the appropriate action to abide by the final determination and decision of the Arbitration proceedings.

25. By way of the Special Adviser's letter dated 20.9.2004, the Special Adviser notified the defendant and the plaintiffs and all parties concerned that the GOM has accepted the fair value for all the 60% equity in NUR as RM332,336,000.00 and that AACC will prepare the Sale and Purchase Agreement between the plaintiffs as Vendor and the defendant as purchaser for the sale and purchase of all of the plaintiffs' 60% equity in NUR at the purchase consideration of RM332,336,000.00 ("SPA").

26. On or about 19.10.2004, Ketua Setiausaha Sulit kepada YAB Perdana Menteri wrote to the defendant, for the attention of the chairman of the defendant's board, Y.Bhg Datuk Amar Leo Moggie stating that the independent valuation exercise carried out by AACC in respect of the disposal of all of the plaintiffs' 60% equity in NUR is to be abided by the defendant and implemented.

27. On 28.10.2004 AACC forwarded to the defendant an engrossed copy of the SPA but the defendant has failed, neglected and omitted to enter into and execute the SPA with the plaintiffs contrary to their obligation and the GOM's directive.

28. The plaintiffs shall, amongst other things, refer to and rely on the series of correspondence and documents stated in paragraphs 7, 9, 11, 12, 17, 20, 21, 22, 23, 24, 25, 26 and 27 above for its full terms and effect at the Trial and at the Hearing of all Interlocutory Applications.

29. By reason of the matters aforesaid and from AACC's Final Valuation Report there is a concluded Contract, valid, binding and enforceable as between the plaintiffs as vendors for the sale, disposal and transfer by the plaintiffs and the defendant as purchaser for the purchase, acquisition and acceptance of transfer by the defendant of all of the plaintiffs' 60% equity in NUR free from all encumbrances at the purchase consideration of RM332,336,000.00 ("Contract").

30. At all material times, the plaintiffs are ready, willing and able to perform and discharge their part of the contract to sell and transfer all of the plaintiffs' 60% equity in NUR to the defendant.

31. As a result of the defendant's fundamental breach of contract the plaintiffs have suffered substantial pecuniary damage and loss.

32. Despite repeated demands made by the plaintiffs, the defendant has up to date failed, neglected and omitted to perform and discharge their obligations, undertakings and covenants to purchase and acquire and accept a transfer of all of the plaintiffs' 60% equity in NUR free from all encumbrances from the plaintiffs at the purchase consideration of RM332,336,000.00.

[80] In my judgment, the averments in the plaintiffs' statement of claim, even if they are true, do not disclose the conclusion of a contract for the sale and purchase of the shares of NUR ('the NUR shares') between the plaintiffs and the defendant.

[81] It is common ground that there was never any formal written sale and purchase agreement pertaining to NUR shares entered into between the plaintiffs and the defendant. Nevertheless the plaintiffs maintain that there was a sale and purchase agreement concluded between the plaintiffs (as the vendors) and the defendant (as the purchaser). But how was this alleged contract formed or concluded? On this, the plaintiffs' position is not clearly explained. And the situation becomes all the more murkier when the plaintiffs, in their endeavour to show that there was indeed a contract concluded, bring into the picture a third party, namely, the Government of Malaysia, portraying the latter, *albeit* erroneously, as an entity with the legal right to impose its will on the defendant.

[82] The pleadings and the affidavits show that there were differences between the plaintiffs and the defendant over what should be the price of the shares; that there was the involvement of the Government of Malaysia who was keen in ensuring that the deal as to the purchase of the plaintiffs' NUR shares went through; that the Prime Minister's office endeavoured to resolve the differences in the position taken by the respective parties as to what should be the fair price of the shares; that there was also the appointment of an independent valuer, Anuarul Azizan Chew Consulting Sdn Bhd (AACC) appointed to conduct a study and to recommend to the parties the fair price of the shares; and that the defendant rejected the recommendation of the independent consultant on the pricing of the shares.

[83] But to my mind it cannot, however, be inferred from the facts averred by the plaintiffs in their statement of claim that there was a sale and purchase agreement pertaining to NUR shares concluded between the parties. And the hopelessness of the plaintiffs' case is further exacerbated when one considers the affidavits and the documentary evidence.

[84] Mr. L.H. Chua, the learned counsel for the respondents/plaintiffs, submits that the plaintiffs had made a positive assertion in the statement of claim that there is a concluded contract between the plaintiffs and the defendant; and that if this positive assertion is disputed by the appellant/defendant, which is certainly the case here, then there is a serious dispute as to a material fact; and this dispute can only be resolved by way of a trial and not summarily by way of a striking out application. The learned counsel refers to *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers & Ors* [2000] 2 CLJ 457 wherein Mokhtar Sidin JCA said (at p. 468):

> The court cannot conduct a trial on the silent cold-printed or typewritten words in the opposing affidavits where there is a serious dispute or conflict on material facts, a finding of which by the trial judge will have a decisive consequence on the case of the parties.

And at a later part of the judgment the learned judge said (at p. 470):

> This is, therefore, not a proper case for the court to exercise its summary power under O. 18 r. 19 or under the inherent jurisdiction of the court under O. 92 r. 4 of the Rules of the High Court 1980.

[85] There is no doubt that the general principle is correctly stated by Mokhtar Sidin JCA in the case cited. But, with respect, in the present case, is there a serious dispute on the issue as to whether or not there is a concluded contract between the parties? In my judgment, based on the pleadings and the affidavits, including the documentary evidence, the answer is clearly 'No'. What the learned counsel is referring to when he submitted that there is a positive assertion by the plaintiffs that there is a concluded contract between the parties must be para. 29 of the statement of claim wherein it is averred:

> 29. By reason of the matters aforesaid and from AACC's Final Valuation Report there is a concluded contract, valid, binding and enforceable as between the Plaintiffs as Vendors for the sale, disposal and transfer by the Plaintiffs and the Defendant as Purchaser for the purchase, acquisition and acceptance of transfer by the Defendant of all of the Plaintiffs' 60% equity in NUR free from all encumbrances at the purchase consideration of RM332,336,000.00 ('Contract').

[86] In my judgment, the above para. 29 is merely a self-serving assertion. If the plaintiffs intend to show in their pleading that *prima facie* there is a concluded contract between the parties, that, as a matter of the law of pleadings, cannot be done simply by making an assertion in the statement of claim that there is a concluded contract between the parties, as is done here by the plaintiffs by their para. 29. The law requires that the plaintiffs must plead material facts that point out, or from which an inference can be made as, to the formation of a concluded contract between the parties. Paragraph 29 is merely the opinion or conclusion of the plaintiffs as to whether or not there is a concluded contract between the parties, supposedly based on the preceding averments in the statement of claim, Therefore it is the preceding averments in the statement of claim that must be critically examined so as to ascertain as to whether or not sufficient facts have been averred

A that *prima facie* point to the formation of a contract between the parties or from which the conclusion of a contract could fairly be inferred. I have examined and analysed the averments, the affidavits (of all parties) and the documentary evidence exhibited critically. However, I am not persuaded that sufficient credible
B facts have been pleaded that point to the conclusion of a contract between the plaintiffs and the defendant, or from which the existence of a concluded contract between the plaintiffs and the defendant can be inferred. Instead, an evaluation of the pleadings, the affidavits and the documentary evidence reveals that the
C plaintiffs have made averments which are either wholly untrue or mere half-truths. There are also averments that are not only irrelevant but tend to cloud the issue.

[87] I shall begin my elaboration with para. 11 of the statement
D of claim. This paragraph states:

> 11. On 15.3.2003 in response to the Special Adviser's letter dated 20.2.2003 and by way of a reply to the Special Adviser the defendant confirmed their offer to purchase all of the plaintiffs' 60% equity in NUR and that the defendant
E will commence negotiations with all parties concerned.

[88] I have examined the defendant's Chairman's letter to the Special Adviser dated 15 March 2003. The letter (exh. TM8) reads as follows:

F

TENAGA
NASIONAL BERHAD

Datuk Dr. Awang Adek bin Hussin

Pengerusi
G 129 Jalan Bangsar
Peti Surat 11003
50732 Kuala Lumpur

Tel: 03-22966011/03-22966612
H Fax: 03-22827641/03-22828218

TNB/VTR. 23/3/12

I

15 Mac 2003

YBhg. Tan Sri Dato' Seri Ali Abul Hassan bin Sulaiman
Penasihat Khas
Kepada YAB Perdana Menteri
Jabatan Perdana Menteri
Aras 2, Blok Barat, Bangunan Perdana Putra
Pusat Pentadbiran Kerajaan Persekutuan
62502 Putrajaya

YBhg Tan Sri,

KHTP Independent Power Utility (IPU)
Nur's Sale Of Excess Power To TNB

Terlebih dahulu saya mendoakan agar YBhg. Tan Sri sentiasa dilindungi Allah SWT dan berada dalam keadaan sihat sejahtera.

YBhg Tan Sri,

Saya dengan hormatnya merujuk kepada surat YBhg. Tan Sri bertarikh 20 Februari 2003 bersabit dengan perkara di atas.

Terlebih dahulu saya ingin merakamkan ucapan terima kasih kami kepada YAB Perdana Menteri yang telah memutuskan agar TNB mengambilalih saham-saham pegangan Manfield Development Sdn. Bhd. dan Jalinan Muhibbah Sdn Bhd. di dalam Syarikat Northern Utilities Resources Sdn. Bhd. (NUR) sebagai usaha penyelesaian pembelian tenaga berlebihan daripada IPU di Kulim Hitech Park (KHTP).

Sehubungan dengan ini, pihak TNB akan memulakan rundingan bersama dengan semua pihak yang berkenaan bagi mencapai persetujuan pengambilanalih kepentingan-kepentingan mereka dalam Syarikat NUR. Pihak kami akan sentiasa peka terhadap kepentingan bersama semua pihak dalam usaha mencapai kata persetujuan yang akan dimuktamadkan segera.

Saya sekali lagi mengucapkan ribuan terima kasih kepada YBhg. Tan Sri di atas segala bantuan serta nasihat yang telah dan akan diberikan dalam perkara ini. Dari masa ke semasa, pihak saya akan memaklumkan kemajuan rundingan yang dibuat.

"TNB – Penggerak Kemajuan Negara"

Dengan hormatnya,

t.t.

Datuk Dr Awang Adek bin Hussin
Pengerusi

[89] It is to be observed that the fourth paragraph of the defendant's letter is cautiously worded. This paragraph states:

> Sehubungan dengan ini, pihak TNB akan memulakan rundingan bersama dengan semua pihak yang berkenaan bagi mencapai persetujuan pengambilanalih kepentingan-kepentingan mereka dalam Syarikat NUR. Pihak kami akan sentiasa peka terhadap kepentingan bersama semua pihak dalam usaha mencapai kata persetujuan yang akan dimuktamadkan segera.

[90] Contrary to what is claimed by the plaintiffs in their averment in para. 11, this letter does not suggest or imply that there was an offer to purchase the plaintiffs shares by the defendant. The content of this polite and carefully worded letter to the Special Adviser to the Prime Minister is non-committal and clearly negates the plaintiffs' claim that there was a confirmation of an offer by the defendant to purchase the plaintiffs' equity in NUR. In any case, significantly, the letter is addressed to the Special Adviser and not to the plaintiffs. Strictly this letter is of no legal significance in determining as to whether or not there was a concluded contract between the plaintiffs and the defendant. Strictly, this letter is irrelevant. At best it only serves as background information. But to say that the letter confirmed the defendant's offer to purchase is to mislead the reader. What is relevant, however, is the defendant's letter as referred to in para. 12 of the statement of claim. But again here the 'offer' is merely a non-binding indicative offer.

[91] So, I shall move to para. 12 of the statement of claim. This paragraph states:

> 12. On 23.06.03 by way of the Defendant's letter to the Plaintiffs the Defendant made an offer to purchase all of the Plaintiffs' 60% equity in NUR at a sum of RM25,420,000.00 based on the Defendant's valuation after the performance of a due diligence exercise on NUR. The Plaintiffs rejected the Defendant's offer with regard to the valuation.

[92] The above averment is merely a half-truth. The above averment fails to disclose (1) that the defendant's 'offer' was expressly stated to be merely a 'non-binding indicative offer'; and (2) that this non-binding indicative offer to purchase the plaintiffs' shares was subject to various fundamental conditions precedent, namely:

(i) there has to be a creditors' agreement to restructure the existing debt owing by NUR; and based on the defendant's preliminary evaluation exercise, with the restructuring of the debt entailing at least 60% haircut by the creditors;

(ii) the carrying out of a due diligence exercise which includes financial, legal and technical aspects;

(iii) the outcome of a detailed commercial evaluation by the defendant;

(iv) the approval of the defendant's board of directors;

(v) the approval of the relevant authorities; and

(vi) the finalization of a definitive share sale agreement.

[93] I think I should also add at this juncture that despite the above requirements and conditions precedent, it is clear from the pleadings, affidavits and documentary evidence that there was no creditors' agreement to restructure the existing debt of NUR; that there was no approval of the defendant's board of directors obtained; and that there was no finalization of a definitive share sale agreement.

[94] Paragraph 14 of the statement of claim states that:

> 14. Due to the vast difference in the respective valuations, the then YAB Prime Minister of Malaysia decided that there shall be an independent valuation of all of the Plaintiffs' 60% equity in NUR and that the GOM [Government of Malaysia] shall be the Arbitrator to resolve.

[95] The truth is that the Government of Malaysia had never made any decision appointing itself to be the arbitrator to resolve the issue pertaining to what ought to be the fair price of the NUR shares. In fact this averment to the effect that the Government of Malaysia had decided to appoint itself to be the arbitrator is contradicted by the plaintiffs' own document, namely, the letter of the Special Adviser to the Prime Minister dated 21 June 2004 (exh. MAH 13) which makes no mention of the appointment of the Government as an arbitrator. Instead, in the letter, the Special

A Adviser described the role of the Government merely as a 'Mediator'. Indeed, when it was denied by the defendant in para. 15 of its statement of defence that there was ever an appointment of the Government of Malaysia as an arbitrator, the plaintiffs in para. 18 of their reply changed their position and now state that
B the Government of Malaysia was 'compelled to play the role of a mediator'.

[96] Therefore, there was never any arbitration process that took place between the parties. What happened was that due to the
C vast difference in the respective valuations, the plaintiffs and the defendant had mutually agreed at the recommendation of the Government through the Prime Minister's office to the appointment of an independent consultant to study and recommend the value of the plaintiffs' 60% equity in NUR to the
D defendant subject to the submissions and review from both the plaintiffs and the defendant and upon the conclusion of a due diligence exercise of NUR.

[97] Paragraph 21 of the statement of claim states:

E > 21. By way of letter dated 28.6.2004 signed by the defendant's Chief Executive Officer (whose term of office ended on 30.6.2004) and faxed to the plaintiffs on 2.7.2004 and a copy sent to the Special Adviser, the defendant stated their intention to withdraw from the Arbitration.

F **[98]** There is also no truth in the above averment. The fact is that, as has been said earlier, there was no arbitration proceeding in the first place; so there cannot be any 'intention to withdraw from the Arbitration'. The truth of the matter is that the defendant's letter of 28 June 2004 (exh. TM22) merely states:
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(i) that the defendant's board of directors had rejected the valuation report and that the defendant had never agreed to the final report; and

H (ii) that the defendant was withdrawing its non-binding indicative offer of 23 June 2003.

[99] Among the main reasons for the defendant's rejection of the AACC's report and recommendation is that the report and recommendation were premised on the following assumptions,
I which from the defendant's standpoint were erroneous:

(i) that it was the intention of the Government that the defendant was to enter into a Power Production Agreement (PPA) with NUR and to acquire all of the plaintiffs' shareholding in NUR; and

(ii) that NUR must be treated as a going concern based on the assumption that the PPA referred to above will be entered into.

[100] In my judgment, legally, the defendant has every right to reject the valuation as recommended by the independent consultant, AACC, if the defendant's board of directors had taken the view that it was the right thing to do in the interest of the defendant after having evaluated the independent consultant's report and recommendation. An examination into the terms of reference (exh. TM17) of the appointment of the independent consultant (AACC) reveals that the defendant is not bound to accept AACC's recommendation as to the value of the shares. The role of AACC was merely to recommend the sale price. Paragraph 2(f) of the Terms of Reference is clear:

> (f) The Independent Consultant will present the sale price to both the Purchaser and Vendor together with a recommendation to accept the sale price subject to the acceptance of the fair value price by the GOM including conditions pertaining to the Sale and Purchase Agreement;

[101] The sale price as recommended has to be accepted by the plaintiffs and the defendant. Once the sale price has been accepted by the parties, the sale price (together with the conditions of the sale and purchase agreement) must be submitted to the Government for the Government's approval.

[102] In fact, nowhere in the statement of claim is it alleged by the plaintiffs that the parties had agreed to be bound by the recommendation of the independent consultant/AACC as to the pricing. Of course I am mindful of para. 16 of the statement of claim that states:

> 16. The defendant agreed to the GOM's (Government of Malaysia's) Directive that parties involved are to submit to Arbitration for the purpose of determining the fair value of all of the plaintiffs 60% equity in NUR. The Special Committee undertook to shortlist the Independent Consultants and set out the Terms of Reference for the Consultants.

[103] But the above averment is misleading. The parties had never agreed to submit to arbitration. What had happened was that – and this is not disputed – on 24 July 2003 a meeting was held by the Special Adviser to the Prime Minister at Putrajaya wherein the Special Adviser had recommended that an independent consultant be appointed for the purpose of resolving the pricing issue of the plaintiffs' 60% equity in NUR. Further it is significant to note that para. 17 of the statement of claim merely states:

> 17. On 2.10.2003 an Agreement for Consultancy Services was entered into between and executed by the defendant, the plaintiffs and the Independent Consultant, Anuarul Azizan Chew Consulting Sdn Bhd. (Co. No. 373601-V) of No. 18, Jalan 1/64, Off Jalan Kolam Air/Jalan Ipoh, 51200 Kuala Lumpur ("AACC") for the purpose of studying and recommending a fair value for all of the plaintiffs' 60% equity in NUR.

[104] Here the plaintiffs appear to concede that the appointment of the independent consultant was merely 'for the purpose of studying and recommending a fair value for all of the plaintiffs' 60% equity in NUR'.

[105] Paragraph 24 of the statement of claim states:

> 24. On or about 13.09.04, YAB Prime Minister of Malaysia wrote to the Managing Director of Khazanah directing him to take the appropriate action to abide by the final determination and decision of the Arbitration proceedings.

[106] The letter (exh. MH7) reads:

PERDANA MENTERI
MALAYSIA

Encik Azman Haji Mokhtar

Pengarah Urusan
Khazanah Nasional Berhad
22nd Floor, Menara Dato' Onn
Pusat Dagangan Dunia Putra (PWTC)
41, Jalan Tun Ismail
50480 KUALA LUMPUR

Saudara,

Perolehan 60% Ekuiti Pegangan Manfield Development Sdn Bhd (MDSB) Dan Jalinan Muhibbah Sdn Bhd (JMSB) Dalam Northern Utilities Resources Sdn Bhd (NUR) Oleh Tenaga Nasional Berhad (TNB)

Saya telah menerima surat permohonan daripada Manfield Development Sdn Bhd berhubung perkara di atas.

2. Saya mengambil maklum bahawa pihak TNB telah mencadangkan untuk memperolehi 60% ekuiti dalam NUR dan telah dipersetujui oleh Perdana Menteri ketika itu, YABhg. Tun Dr. Mahathir Mohamad dengan harga yang telah dipersetujui melalui proses arbitrasi oleh TNB, MDSB dan JMSB melalui penilaian yang telah dibuat oleh perunding bebas, AACC yang laporan akhirnya telah dikemukakan pada 21 November 2003.

3. Sehubungan dengan itu, saya meminta saudara untuk mengambil tindakan yang sewajarnya bagi permohonan tersebut di atas.

t.t.

(Abdullah bin Haji Ahmad Badawi)
13 September 2004

[107] The above averment (in para. 24) is not only misleading, it is also irrelevant. As has been pointed out earlier, no arbitration proceeding ever took place. The averment is irrelevant in that the letter, as correctly stated in the paragraph, was addressed to the Managing Director of Khazanah. It was not addressed to the defendant. Therefore it is an internal matter between the Prime Minister and the Managing Director of Khazanah, and has nothing to do with the defendant. Furthermore, as a matter of law, whatever direction the Prime Minister gave to Khazanah has no legal consequence on the defendant. But even if the Prime Minister's letter were to be addressed to the defendant, instead of to Khazanah, still it is of no legal significance – but this is an issue that I shall deal with in due course.

[108] The tenor of the Prime Minister's letter indicates that the Prime Minister had not been correctly advised of certain facts, namely, that, there had never been any arbitration proceeding between the parties pertaining to the valuation of the shares; that

A the defendant was not bound by the recommendation of AACC; that the defendant's board of directors had rejected AACC's report and recommendation, and had given reasons; and that the defendant had notified the plaintiffs that it was withdrawing its indicative non-binding offer of 23 June 2003.

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[109] Paragraphs 25 and 26 of the statement of claim read:

> 25. By way of the Special Adviser's letter dated 20.9.2004, the Special Adviser notified the defendant and the plaintiffs and all parties concerned that the GOM has accepted the fair
C value for all the 60% equity in NUR as RM332,336,000.00 and that AACC will prepare the Sale and Purchase Agreement between the plaintiffs as Vendor and the defendant as purchaser for the sale and purchase of all of the plaintiffs' 60% equity in NUR at the purchase consideration of
D RM332,336,000.00 (SPA).
>
> 26. On or about 19.10.2004, Ketua Setiausaha Sulit kepada YAB Perdana Menteri wrote to the defendant, for the attention of the chairman of the defendant's board, Y.Bhg Datuk Amar Leo Moggie stating that the independent valuation exercise
E carried out by AACC in respect of the disposal of all of the plaintiffs' 60% equity in NUR is to be abided by the defendant and implemented.

[110] The above two paragraphs are also irrelevant. The
F averments appear to be based on a misconception on the part of the plaintiffs regarding the powers of the Prime Minister or the Government of Malaysia in relation to the defendant, who is a separate legal entity in relation to the Government; in particular, the power of the Government to override a commercial decision made by the board of directors of the defendant, and to issue a
G directive to the defendant contrary to the wishes of the board of directors of the defendant. For the purpose of determining as to whether or not there is a concluded contract between the plaintiffs and the defendant, an important factor that has to be taken into account is whether the defendant had accepted the
H AACC's valuation (and in the present case the defendant had not); and not whether the Government of Malaysia had accepted AACC's valuation. The proposed purchaser in the proposed transaction is the defendant, and not the Government. Although the Government has some indirect control over the defendant
I through its nominees on the board of the defendant, yet as a

matter of strict law Tenaga Nasional Berhad (the defendant/ appellant) is a separate legal entity from the Government of Malaysia. As a company, the defendant has its own board of directors who owes a fiduciary duty and is accountable to the shareholders; and the company is subject to the Companies Act 1965 and to legal principles concerning corporate governance. It cannot just obey the directive of the Government blindly. Perhaps in the past there might had been occasions where the defendant had abided by the directives of the Government on matters pertaining to commercial dealings of the defendant with private entities. But in those situations, unless such a directive is clearly pursuant to a specific statutory provision, compliance with the Government's directives was merely out of deference for the Government, and not as a matter of a legal obligation. In the present case, in respect of the commercial dealing or transaction of the defendant with the plaintiffs, the Government cannot legally make a decision on behalf of the defendant. And where the board of directors of the defendant had made a decision to reject AACC's recommendation and to withdraw the indicative non-binding offer, and giving reasons for doing so, the Government must respect that decision. It is to be appreciated that Tenaga Nasional Berhad had taken pains to explain its position to the Government. In his letter of 19 November 2003 (exh. TM18) to Tan Sri Ali Abul Hassan (Special Adviser), Datuk Ir. Md. Sidek bin Ahmad's, the Vice President of the defendant, states, among others:

3. Corporate Governance

3.1 Our Assurance advisers have put forward to TNB that being a publicly listed company, with international and institutional shareholders, TNB has a fiduciary duty to all its shareholders and must observe good corporate governance.

3.2 Based on the Malaysian Code of Corporate Governance, TNB must be seen to be acting in 'the best interests of the company ... and [not] in thebest interest of any single shareholder or any shareholder group' (para 4.72-4.73). As such, TNB's Board and management are duty-bound to scrutinize the initial proposal for the PPA with NUR and the subsequent proposed acquisition of NUR such that any decision must be justified by sound commercial principles and the creation of shareholder value.

A **[111]** The Government has no legal authority to override the defendant's decision or to direct the defendant to accept AACC's valuation. For the Government to override or to direct in the manner that it had done in the present case was legally wrong and contrary to the spirit of good governance.

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[112] Hence in the present case the defendant was legally not bound and was legally right in not complying with the directive of the Prime Minister (to accept AACC's valuation) conveyed to the defendant *vide* the letter of the Chief Private Secretary to the
C Prime Minister dated 19 October 2004 (see exh. MAH11).

[113] In conclusion I hold the plaintiffs' statement of claim does not show that *prima facie* there is a concluded contract for the sale of shares between the parties; and that this is so becomes clearer if one were to examine the affidavits and the documentary
D evidence. Hence the plaintiffs' claim is frivolous, vexatious and an abuse of the process of the court.

[Appeal allowed with costs; order of the High Court set aside.]

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